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No. 92-1266

IN THE

Supreme Court of the United States

October Term, 1992

E. J. LEIZERMAN,
Petitioner,

vs.

TOLEDO BAR ASSOCIATION,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. May states, consistent with the Supremacy Clause, enforce Disciplinary Rule 5-103(B) which prohibits lawyers from guaranteeing their clients' loans for medical and living expenses while representing them on pending litigation involving claims under the Federal Employers Liability Act (FELA) or under state law?

2. Does the state disciplinary rule prohibiting attorneys from guaranteeing their clients' loans for medical and living expenses during pending litigation violate any constitutional rights of Petitioner or his clients?

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BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

STATEMENT OF THE CASE

This action was commenced on October 18, 1990 when the Respondent Toledo Bar Association filed a complaint with the Board of Commissioners on Grievances and Discipline of the Supreme Court of Ohio alleging that Petitioner had violated DR 5-103(B) of the Ohio Code of Professional Responsibility, in that he had guaranteed, as co-maker, bank loans made to twelve

clients of Petitioner's firm. The loan guarantees totalled $93,800 as of November 15, 1989. Petitioner's Appendix, A1, A2, A10.

Respondent does not dispute much of Petitioner's description of what transpired before the Board of Commissioners and the Supreme Court of Ohio. To the extent that Petitioner paraphrases the findings of those bodies, the actual findings are set forth in Petitioner's Appendix. Respondent does, however, dispute Petitioner's statement of the case to the extent that it contains argument. *See, e.g.,* Petition, p. 3.

Petitioner's statement of the case contains much self-serving "evidence" that he presented to the Board of Commissioners in an effort to justify his conduct and to demonstrate that the enforcement of DR 5-103(B) impaired the rights of some of his clients to pursue claims under the FELA. *See, e.g.,* Petition, pp. 4-5. Respondent did not dispute most of this evidence during the disciplinary proceeding below because it was irrelevant to the issues at hand. The evidence was irrelevant to whether Petitioner violated DR 5-103(B) and to whether DR 5-103(B) violated the Supremacy Clause. The evidence also did not affect the outcome of Petitioner's other constitutional claims which failed because, even if DR 5-103(B) had denied the rights of Petitioner's clients to access to the courts, the disciplinary rule did not infringe on a fundamental right and it bore a rational relation to legitimate state interests.

Petitioner's statement of the case falsely states that "the Ohio and federal court precedents . . . are in direct conflict" on the issue of whether it is permissible for lawyers to guarantee loans for living expenses to clients. *See* Petition, p. 5. There is no conflict between Ohio's DR 5-103(B) and the two federal court precedents relied upon

by Petitioner. The first federal precedent Petitioner cites is a 1965 decision by a federal district judge in Cleveland which interpreted a canon of professional ethics that no longer exists. *In re Ruffalo*, 249 F. Supp. 432 (N.D. Ohio 1965). The ethical canon interpreted in *Ruffalo* was superseded in 1970 when Ohio adopted DR 5-103(B) which expressly prohibits Petitioner's conduct in this case.

Nor is DR 5-103(B) in "direct conflict" with an order that Petitioner himself procured in 1991 from a U.S. Magistrate in an apparent attempt to bolster his Supremacy Clause argument in this case. Neither the motion that Petitioner filed with the Magistrate nor the resulting order addressed DR 5-103(B).

On May 23, 1991, while this disciplinary proceeding was pending but before the hearing thereon, and without notice to the Respondent Bar Association, Petitioner sought an order from the U.S. Magistrate in Toledo purporting to authorize Petitioner to lend $1,500 to Elvin Williams, a client of Petitioner who was not among the twelve clients who were the subject of the present disciplinary proceeding. *See* attached Appendix A1. Petitioner did not inform the Magistrate that there was a disciplinary case pending against him relating to financial assistance he provided to his other clients. Nor did Petitioner even discuss DR 5-103(B) with the Magistrate. Hearing Tr. at 136, 147-48. To the contrary, Petitioner's motion gave the Magistrate the misleading impression that the proposed loan to Mr. Williams constituted acceptable practice:

> "In this regard, the trend nationally is for the courts to not only recognize these needs, but to authorize advances or loans for living expenses."

See attached Appendix A2.

Petitioner's motion before the Magistrate was not opposed. On the same day the motion was filed, the Magistrate issued a one sentence order authorizing Petitioner to make the proposed loan. *See* Petitioner's Appendix A26. The Magistrate's order does not address, or even mention, DR 5-103(B).[1]

One final aspect of Petitioner's statement of the case needs to be clarified. Not all of the clients for whom Petitioner guaranteed loans were FELA claimants with cases pending in federal court. The Petitioner guaranteed loans for three personal injury clients who were pursuing claims for uninsured or underinsured motorist coverage under state law. *See* Petitioner's Appendix A2, A8, A9 and A11.

[1] On September 19, 1991, Petitioner filed a motion with the Ohio Supreme Court seeking permission to make the loan to Mr. Williams. That motion was denied on October 23, 1991. *See* attached Appendix A4.

REASONS FOR DENYING THE WRIT

I. Ohio's Disciplinary Rule Prohibiting Loan Guarantees To Clients Does Not Violate The Supremacy Clause.

A. There is no conflict between state and federal law on this issue.

Ohio's Dr 5-103(B) does not violate the Supremacy Clause because it does not conflict with any established federal law. There is no federal rule, code or statute which authorizes an attorney to guarantee loans to clients in litigation. The FELA does not encourage, authorize or empower plaintiff's lawyers to advance or guarantee loans to their clients. Nor do the rules of the United States District Court for the Northern District of Ohio authorize such conduct. In the absence of some federal law which arguably conflicts with the state law under review, the Supremacy Clause is inapplicable. *English v. General Electric Co.*, 496 U.S. 72 (1990) ("State law is pre-empted to the extent that it actually conflicts with federal law").

Petitioner's Supremacy Clause argument is based solely on two decisions by federal district courts in Ohio. Neither of these decisions, however, conflicts with the Ohio Supreme Court's enforcement of DR 5-103(B).

The *Ruffalo* decision cited by Petitioner was issued five years before DR 5-103(B) was adopted. *See In re Ruffalo*, 249 F. Supp. 432 (N.D. Ohio 1965). The district judge in *Ruffalo* interpreted a previously-existing canon of professional ethics which did not specifically address advances or guarantees of financial assistance to clients (other than for expenses of litigation), but rather prohibited in broad language the acquisition of an interest in litigation. *Id.* at 440-41. The district judge

disagreed with the conclusion of the Ohio Supreme Court that the attorney violated this canon when he made small loans to a few of his clients for living expenses. *Id.* at 443.[2]

Five years after *Ruffalo*, the Ohio Supreme Court adopted DR 5-103(B), which clearly and unambiguously prohibits loan guarantees to clients for medical and living expenses. Because the *Ruffalo* Court interpreted and applied a rule other than 5-103(B), there is no conflict between that decision and Ohio's disciplinary rules.

The order that Petitioner obtained from the U.S. Magistrate in the *Elvin Williams* case adds nothing to his Supremacy Clause argument. Neither the motion filed by Petitioner, nor the order issued by the Magistrate, addressed the ethical issue presented by DR 5-103(B). Because the purported conflict between Ohio's rule and federal law is illusory, this Court's intervention is unnecessary.

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[2] The Sixth Circuit Court of Appeals criticized the district judge's decision in *Ruffalo* regarding the loan guaranteees. *In re Ruffalo*, 370 F.2d 447, 450 (6th Cir. 1966) *rev'd on other grounds*, 390 U.S. 544 (1968).

B. The Supremacy Clause does not apply to Petitioner's disciplinary violation as it pertains to the three non-FELA clients.

Even if Petitioner's Supremacy Clause argument had merit, it would not change the result in this case. Petitioner's public reprimand was based in part on conduct unrelated to any federal law or case. Both the Board of Commissioners and the Ohio Supreme Court found that the testimony was uncontroverted that Petitioner co-signed notes for clients involved in non-FELA cases after funds had been disbursed to clients. *See* page 4 *supra*. While his co-signing on those loans apparently facilitated renewals, rather than advancements, of loans to those clients, his conduct clearly fell within the prohibition of DR 5-103(B) against guarantees of financial assistance to clients.

Petitioner's conduct in the non-FELA cases provides an adequate and independent basis for his discipline which does not raise issues of federal or constitutional law. This case is not, therefore, appropriate for Supreme Court review.

II. The State Court's Enforcement Of DR 5-103(B) Does Not Deny Anyone's Access To The Courts And Does Not Deny Rights Protected By The First Amendment, The Due Process Clause Or The Equal Protection Clause.

Petitioner's remaining constitutional arguments are based on the false premise that the state court's enforcement of DR 5-103(B) results in a denial of the rights of Petitioner's clients to access to the courts.[3] Petitioner's clients all had full access to the federal courts to litigate their FELA claims.

Contrary to Petitioner's suggestion, DR 5-103(B) does not deny financial assistance to Petitioner's clients during the pendency of the litigation. The rule merely denies them financial assistance from one specified source—*i.e.* from their attorney. Petitioner admitted at the hearing below that other lawyers are able to avoid guaranteeing loans for their clients by arranging financial assistance from third parties. Hearing Tr. at 39.

A. There is no protected First Amendment right to provide financial assistance to clients.

The right to lend money to clients, or to guarantee loans made to clients, is not a right protected by the First Amendment. Unlike the rights addressed in the cases cited by Petitioner, it does not involve considerations of the freedom of association (the *Button*,

[3] It is certainly unclear whether Petitioner has standing to assert constitutional claims which are based on alleged deprivations of the rights of third parties. Ordinarily, a litigant "must assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights or interests of third parties." *Valley Forge Christian College v. Americans United for Separation of Church & State, Inc.*, 454 U.S. 464, 474 (1982) (*quoting Warth v. Seldin*, 422 U.S. 490, 499 (1972)).

Primus and *United Mine Workers* cases) or considerations of free speech (the *Bates, Gentile, Shapero* and *Zauderer* cases).

The extension of loans or other financial assistance to clients is a purely commercial activity subject to state regulation. This Court has held that commercial activities of lawyers fall within a field traditionally subject to government's economic and professional regulation. *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447, 460 (1978).

B. Enforcement of DR 5-103(B) does not violate Due Process.

For purposes of a Due Process analysis, an individual's right to pursue a civil action seeking money damages for personal injuries is not a fundamental right. Nor does a person have a fundamental right to receive financial assistance from his attorney or to be free from economic pressures while maintaining his civil lawsuit. A state law which is alleged to infringe on such rights, therefore, will withstand a Due Process challenge if it bears a rational relation to a legitimate state objective. *See e.g., Whalen v. Roe*, 429 U.S. 589, 597 (1977). DR 5-103(B) comports with Due Process because it bears a rational relation to several legitimate state interests.

States have a substantial interest in regulating the practice of law within their borders. *Sperry v. State of Florida*, 373 U.S. 379, 383 (1963); *Ohralik, supra*, 436 U.S. at 460. The rule prohibiting loans to clients for living expenses has been adopted by most states. The rule was incorporated in the ABA's 1969 Code of Professional Responsibility (DR 5-103(B)) and was preserved in the ABA's 1983 Model Rules of Professional Conduct (Rule 1.8(e)).

There are many legitimate state interests supporting DR 5-103(B). The rule rests upon the policy of discouraging a lawyer from acquiring a financial interest in litigation, to insure that the lawyer's independent professional judgment is not clouded by extraneous concerns. The existence of a loan or guarantee increases the lawyer's ability and motive to overreach in dealings with his client. It forces the lawyer to consider his own economic interests in exercising legal judgment, and opens the way for his substitution of his own interests for those of his client. *In re Stewart*, 121 Az. 243, 589 P.2d 886, 888 (1979); *Shea v. Virginia State Bar*, 236 Va. 442, 374 S.E.2d 63 (1988); *Kentucky Bar Ass'n v. Mills*, 808 S.W.2d 804 (Ky. 1991). The existence of a loan or loan guarantee also reduces or eliminates, as a practical matter, the client's right to discharge the lawyer. *In re Brown*, 298 Ore. 285, 692 P.2d 107 (1984).

By prohibiting financial assistance to clients for living expenses in all cases, DR 5-103(B) prevents improper competition among lawyers on the basis of their expenditures to clients. *Attorney Grievance Comm'n of Maryland v. Kandel*, 317 Md. 274, 563 A.2d 387, 390 (1989). The rule also prevents the prospect of financial assistance from being used as a form of solicitation for future cases and new clients. *In re Reaves*, 250 S.E.2d 329, 331 (S.C. 1978). *See also* Petitioner's Appendix A6 (Holmes *J.*, dissenting). If publicized, either by the lawyer or by word of mouth, the financial assistance is, or gives the appearance of being, an inducement to attract business and is an improper basis for a client's choosing a particular lawyer or firm. *In re Carroll*, 124 Az. 80, 602 P.2d 461, 467 (1979).

Finally, often the only witnesses to the circumstances of the loan would be the parties thereto, rendering the transaction virtually immune from effective scrutiny and oversight by the courts or the profession "in contravention of the State's strong interest in regulating members of the Bar in an effective, objective, and self-enforcing manner." *Ohralik, supra*, 436 U.S. at 467-468.

For all of these reasons, the State of Ohio was well within its authority to determine that the practice of making and guaranteeing loans to clients for living expenses is incompatible with the practice of law. That determination is certainly not an irrational one in violation of Due Process.

C. Petitioner's Equal Protection challenge to DR 5-103(B) is meritless.

Petitioner's Equal Protection argument is based on the fact that DR 5-103(B) creates a distinction between *types of advancements* to clients. Such a distinction does not trigger Equal Protection considerations. In order to subject a law to review under the Equal Protection Clause, one must be able to demonstrate that the law classifies *persons* in some manner.

Apparently recognizing that fact, Petitioner suggests at the end of his Equal Protection analysis that the burden imposed by DR 5-103(B) falls only upon poor clients. This suggestion, however, adds nothing to Petitioner's argument. A classification based on economic status or wealth has not been regarded by this Court as suspect. *San Antonio School Dist. v. Rodriguez*, 411 U.S. 1 (1973). This Court has upheld many legislative actions which have burdened poor persons if the actions have a rational relationship to any legitimate

end of government, at least where the legislative action did not infringe upon a fundamental right. *See, e.g., United States v. Kras*, 409 U.S. 434 (1973).

DR 5-103(B) does not create a suspect classification or infringe on a fundamental right of Petitioner or his clients. The rule, which is the law of most states in this country, clearly bears a rational relation to legitimate state objectives. *See* pages 9-11 *supra*.

CONCLUSION

The Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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APPENDIX

(Filed May 23, 1991)

Case No. 3:90CV7311

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
WESTERN DIVISION

ELVIN WILLIAMS,
Plaintiff,

vs.

CONSOLIDATED RAIL CORPORATION,
Defendant.

HON. JAMES G. CARR

MOTION FOR AUTHORIZATION TO ADVANCE MONEY FOR LIVING EXPENSES

NOW COMES Plaintiff, by and through counsel, and hereby makes application to the court for an order authorizing plaintiff's counsel, E. J. Leizerman, to advance to plaintiff, the sum of One Thousand Five Hundred Dollars $1,500.00 for living expenses such sums to be repaid out of the proceeds of any settlement or judgment.

E. J. LEIZERMAN
Attorney for Plaintiff

MEMORANDUM

This is an action for injuries sustained by the plaintiff, Elvin Williams, in the course of his employment with defendant, Consolidated Rail Corporation. The action is brought solely and exclusively pursuant to the Federal Employers' Liability Act, 45 U.S.C. Sec. 51 *et seq.*

As can be seen from the attached affidavit, plaintiff is indigent. His railroad benefits have expired (par. 3); he sold his car for living expenses (par. 4); he lives with his mother because he cannot afford to pay rent (par. 4, 5). Plaintiff therefore has a real need for funds in order to see his case through to a reasonable conclusion.

Accordingly, plaintiff respectfully requests authorization from this court for his attorney to advance or loan him money for living expenses. It will be noted that Conrail itself advances money to injured workers for living expenses, but these have long since terminated (two years ago).

In order for plaintiff to continue to prosecute this action, he turns to this court for authority to obtain advances for living expenses. In this regard, the trend nationally is for the courts to not only recognize these needs, but to authorize advances or loans for living expenses. The court's attention is directed to General Rule 39 of the United States District Court for the Northern District of Illinois, a copy of which is attached hereto, which specifically permits such a practice. In relevant part, the Rule provides:

> Upon good cause shown, however, the Court may, after proper filing of a complaint, authorize the advancing or loaning of money to an indigent plaintiff by the attorney for court costs, medical and living expenses subject to reimbursement out of the proceeds of any settlement or judgment.

Plaintiff submits that the procedure outlined above by the Northern District of Illinois is a salutary one which provides full disclosure to the court and all counsel. By making this application, plaintiff is merely following the prudent course of seeking judicial sanction for something that is already being done in other federal district courts.

WHEREFORE, plaintiff respectfully prays that this motion be granted.

Respectfully submitted,

E. J. LEIZERMAN (0011300)
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CERTIFICATION

This is to certify that a copy of the foregoing Motion for Authorization was mailed this _____ day of May, 1991 to Richard F. Ellenberger, DOYLE, LEWIS & WARNER, 202 North Erie Street, P.O. Box 2168, Toledo, Ohio 43603.

E. J. LEIZERMAN
Attorney for Plaintiff

Case No. 91-1879

THE SUPREME COURT OF OHIO

TOLEDO BAR ASSOCIATION,
Respondent,

v.

E. J. LEIZERMAN,
Movant.

To wit: October 23, 1991

ENTRY

This cause came before the Court upon movant's motion to be permitted to advance living expenses to clients. Upon consideration thereof,

IT IS ORDERED by the Court that said motion to be permitted to advance living expenses to clients be, and the same is hereby, denied.

/s/ THOMAS J. MOYER
Chief Justice